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Supreme Court of the United States

OCTOBER TERM, 1941.

NOS. 1209-1210

GLADYS M. WESTPHAL, WIDOW OF F. GILBERT WESTPHAL, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, AND ELLEN MAE WESTPHAL, MINORS, CHILDREN OF GLADYS M. WESTPHAL AND F. GILBERT WESTPHAL, BY GLADYS M. WESTPHAL, THEIR GUARDIAN AD LITEM,

Petitioners,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, KANSAS CITY, MISSOURI, A CORPORATION.

GLADYS M. WESTPHAL, WIDOW OF F. GILBERT WESTPHAL,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, KANSAS CITY, MISSOURI, A CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, By GLADYS M. WESTPHAL, Their Guardian ad Litem,

Petitioners,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

May It Please the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Gladys M. Westphal, Widow of F. Gilbert Westphal, Shirley June Westphal, Janice Beth

Westphal, and Ellen Mae Westphal, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by Gladys M. Westphal, their Guardian ad Litem, plaintiffs and appellees below, and of Gladys M. Westphal, Widow of F. Gilbert Westphal, plaintiff and appellant below, respectfully shows to this Honorable Court:

Petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled causes on February 5, 1942, (R. 287, 288), the first judgment reversing the judgment of the District Court of the United States for the Eastern District of Wisconsin entered on August 6, 1941, (R. 250-252), the second judgment dismissing the appeal of Gladys M. Westphal.

Summary Statement of Matter Involved.

Petitioners, a widow and three minor children of F. Gilbert Westphal, brought this action and recovered a judgment as beneficiaries under three insurance policies issued on his life by the Kansas City Life Insurance Company, Kansas City, Missouri, respondent herein, two policies being for $5,000 each, and one for payments of $25.00 a month over the period remaining after the death of Mr. Westphal within twenty years from the date of the policy and a payment of $2500 at the end of the twenty years (R. 3-10).

Mr. Westphal had been missing and unheard of since November 5, 1931, (R. 166), in Milwaukee, Wisconsin, where he had been residing with his wife and three children in the suburb of the Village of Shorewood for the past two years, and had been employed as cashier and insurance salesman in the branch office of respondent for thirteen months. He was then 32 years of age and had been married ten years (R. 26). He also had living at

that time his father and mother, four brothers, and a married sister (R. 26, 115-119).

The action was commenced March 30, 1940, (R. 2-3), in the Circuit Court of Calumet County, in the State of Wisconsin, in which county petitioners resided in the City of Chilton, and on application of respondent, a foreign corporation, exercising its privilege of selecting a different tribunal, was removed for trial on account of diversity of citizenship to the Federal Court (R. 2). Petitioners served and filed a timely demand for trial by jury on all the issues (R. 17).

Only one issue was made in the pleadings and asserted on the trial, and tried, and that was whether Mr. Westphal had died within certain dates, (R. 3-15), which issue was submitted to the jury on a special verdict of three questions, each question fixing a date, being in the order of the questions, May 28, 1932, April 30, 1932, and November 26, 1931. No objection was made to the instructions to the jury. The jury found that he died before each of said dates (R. 226). The dates so selected by the trial court were the days to which the payment of premiums had made the policies effective.

Respondent at the close of the testimony had moved orally for a directed verdict, the ruling on which was reserved by the trial court under Rule 50 (b), Federal Rules of Civil Procedure. Petitioners entered an objection to the motion (R. 168). After verdict respondent within ten days filed written motions to change the answers of the verdict and for judgment (R. 228-229). Petitioners having objected that the oral and written motions failed to specify grounds as required by Rule 50 (a), Federal Rules of Civil Procedure, the trial court by order amended the motions to disclose the grounds therefor as insufficiency of evidence of petitioners to go

to the jury (R. 228). This then was the issue made on the motions. The trial court filed its written opinion denying respondent's motion, holding, (R. 229-239, reported in 37 F. Supp. 300):

> "that under the Wisconsin decisions the question as to the time of death was for the jury, and that, viewing the evidence in the light most favorable to the petitioners, there was sufficient evidence to sustain the answers to the verdict."

Later other matters mentioned in the opinion of the Court were brought on by motion and disposed of. They are not material to this petition (R. 15-16, 227, 240-244).

However, after order for judgment on the verdict, and before entry of judgment, on claim first brought on by motion of respondent on behalf of the Hartford Accident and Indemnity Company, who had bonded Mr. Westphal as cashier (R. 244-245), the trial court made findings of fact and conclusions of law (R. 245-247), the same as if the issues therein had been duly pleaded, asserted, and tried on the merits between all interested parties, providing for deduction in the judgment from the insurance recovered by petitioner Gladys M. Westphal, widow of the insured, of the sum of $1500 plus interest, or total of $2343.75, for premiums alleged by respondent to have been collected by Mr. Westphal as cashier and not to have been remitted up to November 5, 1931, and alleged by respondent to be cause for disappearance, under clauses in the policies relating to deduction from the insurance of certain indebtedness to the company by the insured, to which findings the said petitioner filed objections and a motion to vacate and set aside the same, (R. 247-249), which was denied (R. 249-250). Intervention had theretofore been denied to the Hartford Company (R. 17-24). These issues had not been asserted and tried. (See Stipulation of parties, R. 260-261).

Respondent appealed from the final judgment (R. 250-252) of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit (R. 252-253). Petitioner Gladys M. Westphal then filed a cross-appeal from that part of the judgment allowing the aforesaid deduction (R. 257-260). The appeals were heard together. Of the three questions raised by respondent, the Court of Appeals considered only the one relating to the action of the District Court under Rule 50 (b) denying respondent's motion for a directed verdict (R. 282). The Court of Appeals, Judge Evans dissenting, ordered the judgment of the District Court reversed (R. 287-288), and in view of the result reached, the cross-appeal of petitioner Gladys M. Westphal dismissed (R. 288).

On the one issue considered, the majority of the United States Circuit Court of Appeals for the Seventh Circuit in its decision, now sought to be reviewed (R. 279-287, reported in 126 F. (2d) 76), did not mention the settled rule that on such a motion the Court must necessarily accept the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners. The Court of Appeals violated this rule. The Court of Appeals was satisfied that, — "unmistakably, there are two inferences made from the evidence." This states a conclusion by the majority judges agreeing with the dissenting opinion, and the trial judge, that there was evidence, not a presumption of fact, upon which the jury could justly and properly base its verdict and finding. The Court of Appeals was not satisfied with the finding of the jury, and held that "the ordinary formulae concerning the province of Judge and jury are of little value in a case of this nature," and then proceeded to invade and usurp the province of the jury and to themselves make their finding from the evidence, reversing the judgment of the District Court and thereby depriving petitioners of trial by jury

on the question of fact to be determined from the evidence in this case and violating the Seventh Amendment to the Constitution of the United States, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Where fairminded men can honestly draw different conclusions, the question is not one of law but of fact to be settled by the jury. The verdict of the jury need not satisfy the Appellate Court, nor the trial court. This is a settled rule of this Court and also the Supreme Court of Wisconsin, and has not been modified by new Rule 50 (b).

> "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error." *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 91.
>
> "The law does not require that the evidence shall satisfy the trial judge. If reasonable minds may differ as to the conclusions of ultimate fact to be drawn from the evidence, the verdict of the jury must be upheld whether the evidence satisfies the trial judge as to the correctness of the jury's conclusions or not."
>
> "But he is not a trier of the facts, and may not usurp the functions of the jury." *Viereg* v. *Southwestern Wis. Gas Co.*, 212 Wis. 394, 395.

It certainly cannot be said that the inference of fact from the evidence accepted by the Court of Appeals was the most favorable to petitioners which could be founded upon the testimony, and that the Court of Appeals in re-examining the fact tried by the jury applied the rules

of the common law governing jury trials. It has been the long settled law in jury trials that the rule mentioned above must be given its fullest application in considering the discard of a jury verdict. Though there was evidence here from which the jury might have reached a different conclusion, that is not under the common law cause for discarding the verdict. It is only where the evidence upon the issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, that the verdict should be set aside. The finding of the jury must be allowed to stand unless all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion. Where the case is close and a jury might find either way, it is no reason for a court to usurp the function of the jury. These are applicable rules stated by this Court in, *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750; *Gunning* v. *Cooley*, 281 U. S. 90, 92, 94; *Berry* v. *United States*, 312 U. S. 450, 453, 456; and *Story Parchment Co.* v. *Peterson Parchment Co.*, 282 U. S. 555, 556. Circuit Judge Evans dissenting, (R. 284-287, 126 F. (2d) 79-80), adheres to the correct rule, and holds that the District Court properly submitted the case to the jury.

The majority of the Court of Appeals in its opinion does not state the evidence as favorable for petitioners as would be logical for consideration under the correct rule and in a way as can be reasonably assumed the jury accepted it as adequate for their verdict. The facts are further discussed in the brief of petitioners.

Basis of Jurisdiction.

The jurisdiction of this Court to review this case the same as if brought here by unrestricted appeal is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stats. 938, 28 U. S. C. A., Sec. 347.

The judgments of the Circuit Court of Appeals to be reviewed were entered February 5, 1942, (R. 287-288). Petition for rehearing timely filed by petitioners (R. 288) was denied on February 26, 1942 (R. 288).

Questions Presented.

The two main questions here presented go directly to the province of the jury and the power of the Court under new *Rule 50 (b), Federal Rules of Civil Procedure,* (see Appendix), to determine questions of fact and to the protection of the right of trial by jury deemed worthy of constiutional provision and safeguard and made sacred to every citizen by the Seventh Amendment to the Constitution of the United States:

1. Whether the United States Circuit Court of Appeals for the Seventh Circuit violated the Seventh Amendment to the Constitution of the United States and the common law governing jury trials in reviewing the action of the District Court under new Rule 50 (b), on motion of respondent to set aside the verdict on the ground of insufficiency of evidence, in failing to take the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners, evidence which the jury might have accepted as adequate to support the conclusion reached in their verdict, and thereby deprived petitioners of trial of the issue of fact by jury.

2. Whether the Court of Appeals in reviewing the action of the District Court under new Rule 50 (b) could disregard the ordinary formulae concerning the province of judge and jury and usurp the function of the jury and decide what inference of fact was to be made from the evidence and violate the rules of the common law governing jury trials and deprive petitioners of their right of trial by jury guaranteed by the Seventh Amendment to

the Constitution of the United States, or whether that function rested exclusively with the jury as their province as the fact finding tribunal.

Subsidiary, and after recovery of judgment by petitioners, is this question:

3. Whether the Circuit Court of Appeals properly dismissed the appeal of petitioner Gladys M. Westphal, thereby approving the allowance made by the District Court of the deduction in the judgment for alleged indebtedness of the insured from the insurance recovered by said petitioner.

Reasons Relied on for the Allowance of the Writs.

1. The Circuit Court of Appeals in reviewing the action of the District Court under new Rule 50 (b) and in reversing the judgment of the District Court has decided the questions as to the sufficiency of the evidence of petitioners to go to the jury, and as to the application of the ordinary formulae concerning the province of judge and jury, and the power of the jury or the Court of Appeals to draw the inference of fact to be made from the evidence, in a way probably in conflict, not only with the decisions of its own Circuit, but also of other circuits, and also the State of Wisconsin, and particularly in conflict with the applicable decisions of this Court, as is pointed out in the Brief on this petition, in the cases of, *Gunning* v. *Cooley*, 281 U. S. 90, 92, 94; *Berry* v. *U. S.*, 312 U. S. 450, 453, 456; *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750; and other cases.

2. There is uncertainty as to the extent of power of the Circuit Courts of Appeals in reviewing the action and discretion of the District Courts under new Rule 50 (b) in re-examining facts tried by a jury as has been recently pointed out by this Court in *Conway* v. *O'Brien*,

312 U. S. 492; *Berry* v. *U. S.*, 312 U. S. 450; and *Halliday* v. *U. S.*, decided January 19, 1942, 86 L. Ed. 393, which question involves the construction of this rule in relation to the Seventh Amendment to the Constitution of the United States, and which question has not been, but should be, settled by this Court.

3. There was substantial evidence to make a jury question whether Mr. Westphal died at the time found by the jury, and for this reason the verdict of the jury should have been upheld and the decision of the trial judge, who held that the question of the time of death was for the jury, and who after having had the same opportunity as the jury to see the many witnesses and hear the evidence on the trial which consumed eight days ruled there was sufficient evidence to sustain the verdict, should have been affirmed by the Circuit Court of Appeals.

4. The conclusion of the majority of the Court of Appeals that "unmistakably, there are two inferences made from the evidence," is an agreement on its part with the trial judge and also Circuit Judge Evans dissenting, that there was sufficient evidence which the jury might have accepted as adequate to support their verdict. After reaching that conclusion the majority of the Court of Appeals has said they have no right to decide which is the right inference. That decision was exclusively for the jury to make as the fact finding tribunal and is binding on the Appellate Court on review. It was the duty of the majority to accept the inference of fact reached by the jury, and to affirm the judgment of the District Court denying respondent's motion under Rule 50 (b) for a directed verdict based on the ground of insufficiency of evidence.

5. The Circuit Court of Appeals in reviewing on appeal the action of the District Court under new Rule 50 (b) on respondent's motion for a directed verdict should

have followed the ordinary formulae concerning the province of judge and jury and not have departed therefrom without precedent or authority in the law and contrary to the Seventh Amendment, and after being satisfied that there are two inferences made from the evidence and that fairminded men can honestly draw different conclusions from the evidence, should not have usurped the function of the jury and decided which inference of fact was to be made from the evidence and have violated the general common law governing jury trials and the Seventh Amendment to the Constitution of the United States and deprived petitioners of their right of trial by jury preserved by this provision of the Federal Constitution.

6. A decision by this Court is necessary in this case to preserve the right of trial by jury as a birthright and heritage guaranteed to every citizen and to keep sacred the Seventh Amendment to the Constitution of the United States, and to prevent abuses of power and conflicting decisions by the courts as to their powers under new Rule 50 (b) of the Federal Rules of Civil Procedure.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750, 751.

7. Under the Wisconsin decisions the question of the time of death during the seven-year period was for the jury. Wisconsin, as stated by Circuit Judge Evans, is in accord with the Supreme Court decisions of many states (R. 285). Respondent removed this case for trial to the Federal Court and petitioners under the supervisory powers of this Court are entitled to have applied under

Erie R. Co. v. *Tompkins,* 304 U. S. 64, by the United States Circuit Court of Appeals for the Seventh Circuit the Wisconsin law.

8. In reversing the judgment of the District Court in this case, the Circuit Court of Appeals has made a wide departure from the conduct of jury trials and the province of the jury considered worthy of constitutional provision and safeguard, and has so far departed from the accepted and usual course of judicial proceedings on jury trials as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioners pray for the reasons here stated and in the supporting brief, that this petition for writs of certiorari be allowed so that the judgments of the Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Honorable Court.

Dated April 30, 1942.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by GLADYS M. WESTPHAL, their Guardian ad Litem,

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